No. 81896-7

SUPREME COURT
OF THE STATE OF WASHINGTON

ANNE and CHRIS McCURRY, on behalf of themselves and others similarly situated,

Petitioners,

v.

CHEVY CHASE BANK, F.S.B.,

Respondent.

PETITIONERS' ANSWER TO *AMICUS CURIAE* BRIEF OF WASHINGTON DEFENSE TRIAL LAWYERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Washington cases

Cases from other jurisdictions

STATUTES, REGULATIONS, AND COURT RULES

I. INTRODUCTION

While the United States Supreme Court has recently clarified that the "plausibility" approach discussed in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007), is apparently applicable to all Fed. R. Civ. P. 12(b)(6) motions, not just those in Sherman Act cases, this clarification should not change the outcome of this case. This Court need not determine whether the plausibility standard applies in Washington to CR 12(b)(6) motions. Whether the Court applies the test stated in *Conley v. Gibson,* 355 U.S. 41, 278 S.Ct. 99 (1957) or the one announced in *Twombly,* the McCurrys stated claims in their Complaint for which relief should be granted in their favor.

II. DISCUSSION

A. Principles applicable to plausibility standard.

In *Ashcroft v. Iqbal,* ___ U.S. ___, 129 S.Ct. 1937, 1939 (2009), a *Bivens* action, the Supreme Court held that the Rule 12(b)(6) motion in the trial court should have been decided under the plausibility standard discussed in *Twombly.* By doing so, the Court implicitly clarified that the plausibility standard for evaluating whether a complaint should be dismissed for failure to state a claim applies to all federal civil actions. Whether the Washington Supreme Court follows the U.S. Supreme Court's lead, however, should have no effect on the outcome of this case.

As clarified in *Ashcroft,* the plausibility standard may be summarized as follows:

> Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." "[D]etailed factual allegations" are not required, *Twombly,* 550 U.S., at 555, 127 S.Ct. 1955, but the Rule does call for sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face," *id.*, at 570, 127 S.Ct. 1955. *Id.*, at 556, 127 S.Ct. 1955. Two working principles underlie *Twombly.* First, the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements. *Id.*, at 555, 127 S.Ct. 1955. Second, determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense. *Id.*, at 556, 127 S.Ct. 1955. A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Ashcroft, 129 S.Ct. at 1940-41.

Understandably, many courts applying the new standard have expressed uncertainty about what it means. *See, e.g., Robbins v. Okla. ex rel. Dep't of Human Servs.*, 519 F.3d 1242, 1247 (10th Cir. 2008) (describing the new formulation as "less than pellucid"); *Phillips v. County of Allegheny,* 515 F.3d 224, 233-35 (3d Cir. 2008) (describing *Twombly* as

"confusing"); *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 188 n. 7 (4th Cir. 2007) ("In the wake of *Twombly*, courts and commentators have been grappling with the decision's meaning and reach."); *Iqbal v. Hasty,* 490 F.3d 143, 155-58 (2d Cir. 2007) (referring to "conflicting signals" in *Twombly*). However, it is clear that specific fact pleading is not required, and that to survive a motion to dismiss, a complaint merely needs to set forth enough facts to raise a reasonable expectation that discovery will reveal evidence supporting the claim. *Twombly,* 127 S.Ct. at 1965; *Lormand v. US Unwired, Inc.,* 565 F.3d 228, 258 (5th Cir. 2009) (citing *Twombly,* 127 S.Ct. at 1965) (complaint must allege enough facts to give rise to a reasonable hope or expectation that discovery evidence supporting loss); *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1296 (11th Cir. 2007) (citing *Twombly,* 127 S.Ct. at 1965) (plausibility standard "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of the necessary element"; it is sufficient if complaint identifies facts that are suggestive enough to render the element plausible).

A motion to dismiss should be denied if the claim "may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly*, 127 S.Ct. at 1969. A court must consider a complaint in its entirety without isolating each allegation in it for individualized review. *In re Pressure Sensitive Labelstock Antitrust*

Litigation, 566 F. Supp.2d 363, 373 (M.D. Pa. 2008) (citing *Twombly,* 127 S. Ct. at 1973 n.14). A complaint adequately sets forth a claim upon which relief may be granted, and a motion to dismiss should be denied, even if actual proof of the facts alleged is "improbable" and "recovery is very remote and unlikely." *Twombly,* 127 S.Ct. at 1965.

B. *Twombly* did not alter rules concerning notice pleading.

Should this Court adopt the plausibility standard stated in *Twombly*, it must be clear in doing so that notice pleading requirements of CR 8(a) are not changed. The Court's latest discussion of Rule 8(a)'s requirements was decided after *Twombly,* in *Adams v. King County,* 164 Wn.2d 640, 656-57, 192 P.3d 891 (2008):

> The complaint properly raised a claim under the common law action for tortious interference with a dead body. Our state rules of civil procedure merely require that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief." CR 8(a). The complaint simply must give sufficient notice to the defendant of the nature of the claim being brought. *Lightner v. Balow*, 59 Wn.2d 856, 858, 370 P.2d 982 (1962) "[P]leadings are primarily intended to give notice to the court and the opponent of the general nature of the claim asserted."). We liberally construe pleading requirements in order "to facilitate proper decision on the merits, not to erect formal and burdensome impediments to the litigation process." *State v. Adams*, 107 Wn.2d 611, 620, 732 P.2d 149 (1987).

Further, initial pleadings that are unclear may be clarified during the course of summary judgment proceedings. *Id.* at 658 (quoting *State v.*

Adams, 107 Wn.2d at 620).

As one court applying the plausibility standard noted, *Twombly* did not alter notice pleading requirements:

> Nothing in *Twombly* has altered Rule 8(a)'s requirement of notice. There is not, and never was, a magic formula for determining when a complaint lacks enough "factual detail," or when it is composed of "mere legal conclusions." Since 1938 [, the year of adoption of the Federal Civil Rules], the final call has been housed within the discretion of the district judge, and guided by the Federal Rules' requirement of notice pleading.

CBT Flint Partners, *LLC v. Goodmail Systems, Inc.,* 529 F. Supp.2d 1376 (N.D. Ga. 2007).

C. The McCurrys' claims pass muster under both the *Conley v. Gibson* and *Twombly* standards.

Both Chevy Chase Bank and Amicus Curiae Washington Defense Trial Lawyers suggest that the McCurrys' claim related to the Bank's charging of the "Notary Fee" cannot survive if the plausibility standard is employed. This argument apparently has its genesis in an unfortunate footnote in the Court of Appeals decision:

> The McCurrys contend that a conceivable fact, requiring reversal, is that Chevy Chase may not have actually had anything notarized. But the McCurrys did not include such an allegation in their complaint, and so it provides no basis to reverse the complaint's dismissal.

McCurry v. Chevy Chase Bank, FSB, 144 Wn. App. 900, 905 n.1, 193 P.3d 155 (2008). As the McCurrys have repeatedly discussed, however,

all of their claims state proper claims for relief, under both the *Conley v. Gibson*[1] and *Twombly* standards. All of the McCurrys' claims "are both plausible and conceivable." *See Davenport v. Washington Educ. Ass'n*, 147 Wn. App. 704, 716 n.24, 197 P.3d 686 (2008) ("Although *Twombly* dismissed a complaint because the facts relied on were not plausible ...., the facts relied on here are both plausible and conceivable.").

In their Complaint, the McCurrys alleged sufficient facts to support their claim that Chevy Chase should not have charged them either the $20 fax fees or the $2 Notary Fee and to support their claim to recover those fees, whether or not Chevy Chase actually incurred these fees and whether or not Chevy Chase actually had anything notarized:

> 11. Plaintiffs signed a Deed of Trust on February 14, 2003 with Defendant .... Paragraph 23 of the said Deed of Trust provides:
>
> > Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs and the Trustee's fee for preparing the reconveyance.

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[1]355 U.S. at 45-46 (Rule 12(b)(6) motion to dismiss should be denied unless there is no set of facts the plaintiff may prove consistent with the complaint that would entitle him to relief).

12. When Plaintiffs paid off the loan secured by the aforesaid Deed of Trust, Defendant prepared a Payoff Statement that itemized the amount due to Defendant. the Defendant demanded "Accumulated Fax Fees" of $20.00 and a "Notary Fee" of $2.00 not authorized by the Deed of Trust, as part of the "TOTAL AMOUNT DUE CHEVY CHASE." ...

13. Plaintiffs paid the two fees, which were neither permitted nor secured by the Deed of Trust.

...

26. ... Defendant has been unjustly enriched by the charging and receipt of the fees referenced herein and Plaintiffs and the Classes are entitled to equitable restitution of these fees, declaratory relief, and incidental damages.

...

27. ... The Deeds of Trust or mortgages signed Plaintiffs and the Class are contracts, which define the rights of the parties including what charges, if any, Defendant may assess upon payoff of the loans. the Deeds of Trust and mortgages do not permit Defendant to charge fees, other than recordation costs and Trustee fees.

28. Defendant breached its contracts with Plaintiffs and the Class by requiring Plaintiffs and members of the Class to pay the fees at the time the loans of the Plaintiffs and the Class were paid off.

...

31. The Plaintiffs and Class members were required to pay the Defendant's fees as alleged herein in order to obtain a release of their mortgage or for their deeds of trust to be reconveyed to them. Defendant's practice of requiring payment of these fees has the capacity to deceive reasonable consumers into believing that they must pay

> these fees – that they are in fact, required to pay these fees – before the lender will release their mortgages or reconvey their deeds of trust. Therefore, this practice is unfair and deceptive under the Consumer Protection Act of Washington, RCW 19.86.
>
> 32. Defendant's practice of charging fees at the time of loan payoff (except for actual recording costs relating to the reconveyance) is unfair and deceptive under the Consumer Protection Act of Washington.

CP 4-8.

Contrary to the Court of Appeals' statement in its footnote, the McCurrys were not required to specifically allege whether Chevy Chase incurred a Notary Fee. The McCurrys stated plausible and conceivable claims for relief that Chevy Chase was unjustly enriched, breached its contract with them, and violated Washington's Consumer Protection Act by alleging (1) The McCurrys' Deed of Trust did not permit Chevy Chase to charge a Notary Fee; (2) The Notary Fee was not secured by the Deed of Trust; (3) When the McCurrys paid off their loan secured by the Deed of Trust, Chevy Chase charged them as part of the "Total Amount" due, a $2.00 Notary Fee; and (4) The McCurrys paid the $2.00 Notary Fee required by Chevy Chase. The assertion of these facts raises a reasonable expectation that discovery will reveal evidence supporting the claims relying on them; if, during discovery, it is determined that Chevy Chase actually had nothing notarized and did not incur a $2.00 notary fee, this

evidence will support the asserted claims. Even if actual proof of the alleged facts is "improbable" and "recovery is very remote and unlikely," these allegations assert a plausible claim sufficient to withstand a CR 12(b)(6) motion. *Twombly,* 127 S.Ct. at 1965. Nevertheless, the McCurrys contend, and their Complaint states a plausible claim, that even if Chevy Chase had something notarized and *did* incur a $2.00 Notary Fee, Chevy Chase was not entitled to pass that fee along to the McCurrys and require them to pay it when they paid off their loan. By doing so, and by collecting the $2.00 payment, Chevy Chase was unjustly enriched, breached its contract with the McCurrys, and violated the Consumer Protection Act.

III. CONCLUSION

It is unnecessary for this Court to adopt the plausibility standard adopted by the United States Supreme Court in *Twombly*, because the claims asserted by the McCurrys in their Complaint are both conceivable and plausible. By the same token, if the Court does adopt the *Twombly* standard, it should have no effect on whether the trial court's order dismissing the McCurrys' Complaint for failure to state a claim was proper – it was not, the trial court should be reversed, and the McCurrys'

case should be reinstated to permit them to present their claims to a jury.

RESPECTFULLY SUBMITTED THIS 24th day of July, 2009.

Guy W. Beckett, WSBA #14939
Co-counsel for Petitioners

CERTIFICATE OF SERVICE

Guy W. Beckett declares:

On July 24, 2009, I sent via e-mail a copy of the foregoing document to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED THIS 24th day of July, 2009, at Seattle, Washington.

Guy W. Beckett, WSBA #14939